9471
QA

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Joint Application of

AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC. SIMMONS AIRLINES, INC. and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE)

and

CANADIAN AIRLINES INTERNATIONAL LTD., and ONTARIO EXPRESS LTD. and TIME AIR INC. (d/b/a CANADIAN REGIONAL) and INTER-CANADIAN (199 1) INC.

under 49 USC §§ 41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement

Docket OST-95-792 - 28

COMMENTS OF TRANS WORLD AIRLINES, INC.

Communications with respect to this document should be sent to:

R. Daniel Devlin
Vice President-Government Affairs
808 17th Street, N.W., Suite 520
Washington D.C. 20006
(202) 457-4752

Richard P. Magurno
Sr. Vice President & General Counsel
One City Centre- 18th Floor
5 15 N. Sixth Street
St. Louis, MO 63101
(3 14) 589-3264

Richard J. Fahy, Jr.
Consulting Attorney
808 17th Street, N.W., Suite 520
Washington D.C. 20006
(202) 457-4764

Scott C. Gibson
V. P. - Planning & Corporate Strategy
One City Centre- 19th Floor
5 15 N. Sixth Street
St. Louis, MO 63 101
(314) 589-3110

June 4, 1996

11pgs

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

Joint Application of AMERICAN AIRLINES, INC. and EXECUTIVE AIRLINES, INC., FLAGSHIP AIRLINES, INC. SIMMONS AIRLINES, INC. and WINGS WEST AIRLINES, INC. (d/b/a AMERICAN EAGLE) and CANADIAN AIRLINES INTERNATIONAL LTD., and ONTARIO EXPRESS LTD. and TIME AIR INC. (d/b/a CANADIAN REGIONAL) and INTER-CANADIAN (199 1) INC. under 49 USC §§ 41308 and 41309 for approval of and antitrust immunity for commercial alliance agreement	Docket OST-95-792

COMMENTS OF TRANS WORLD AIRLINES, INC.

TWA hereby submits the following comments on Order 96-5-38, in which the Department tentatively approved the grant of antitrust immunity to the American/Canadian Airlines International alliance. TWA did not initially filed objections to the request of the alliance for antitrust immunity because it did not serve Canada at the time the application was filed. On May 1, 1996, it instituted St. Louis-Toronto service pursuant to exemption authority granted by the Department, and therefore has a direct interest in the grant of immunity to the alliance carriers.

While TWA continues to take no position on the merits of the American/Canadian Airlines International alliance, we believe that our experience in starting service to Toronto is relevant to Department's grant of antitrust immunity where the bilateral agreement, physical restraints at foreign airports, or other marketplace considerations limit full and open competition with the alliance carriers.

In this proceeding, the Department has determined to grant antitrust immunity despite the lack of complete open skies with Canada on the grounds that there will be the unlimited ability to compete in all U.S.-Canada markets by February, 1998 (pp. 15-16). TWA's experience has shown that the mere existence of a formal open skies arrangement is not enough to insure competitive entry into markets of alliance carriers. TWA initially filed its schedules with the Toronto airport authorities, including a peak period 6 p.m. departure from Toronto, just as it had proposed in its Exhibits in the Toronto Year 2 case. However, it was told that there were no slots available for its service between 4 and 7 p.m. TWA was therefore forced to plan for operation of an inferior and non-competitive schedule for its initial flights. Fortunately, the U.S. government was ultimately successful in persuading Canada to provide appropriate slots at Toronto for TWA's service, Thus, even though it was fully entitled to start service under the transition provisions of the open skies agreement, TWA could not have been fully competitive without further intervention by the U.S. government.

The Department's discussion in its Order to Show Cause indicates that it is well aware of this problem:

> Our policy remains to consider the grant of antitrust immunity only where the market(s) at issue are clearly specified to be fully open to new entry and operations -- both de *jure* (by reason of bilateral agreements) and ***de facto.*** Only in such markets can we be assured that immunity will be pro-competitive and pro-consumer, the touchstones of our immunity approach. Moreover, it must be clearly understood that the existence of an open skies relationship in no way "guarantees" any grant of immunity. To the contrary, it is entirely possible that immunity will not be found to be pro-competitive or pro-consumer in particular cases notwithstanding a fully open national market, depending on such factors as relevant market concentration, potential future barriers, overall dominance and size of the applicants, and the like. (Order 96-5-38, p. 16)

TWA believes that it is important that the Department not only adhere to this policy, but also create mechanisms under which the policy can be enforced in the context of approval of alliance agreements. If potential competitors of the alliance parties are blocked by either governmental or marketplace restrictions in the foreign country, antitrust immunity should be automatically removed from the alliance agreement until the conditions required for full and free competition are established. For example, if the recipient of the Toronto Year 3 award cannot obtain Toronto slots necessary to allow a competitive service, immunity should terminate'. Once the competitor certifies that it is satisfied that the competitive issue has been resolved, immunity for the alliance could be re-established. There is no doubt that as the potential loss of immunity will encourage the alliance carriers to insure that obstructions to competitive service will be quickly removed

---

[1] According to press reports, American and British Airways are discussing a code share alliance for which they would request antitrust immunity. While both Toronto and Heathrow are slot-controlled, a condition such as proposed by TWA would be a far more urgent necessity in the case of Heathrow, where it is notoriously difficult to obtain slots.

If the Department believes that automatic suspension of immunity cannot be accomplished procedurally, it should establish ground rules for carriers to file requests for removal of immunity, on which the Department would rule after receipt of pleadings from the alliance carriers. To allow for this, the proposed five year term of immunity should be conditioned so that immunity can be rescinded upon appropriate action by the Department. Otherwise, the promise of ***de facto*** open markets on which the immunity is premised will become empty. If there is no threat of loss of immunity, the alliance partners will have every incentive to place anticompetitive roadblocks in the way of competitors, secure in the knowledge that there is no antitrust remedy for their joint action

WHEREFORE, TWA respectfully requests that the proposed grant of antitrust immunity be conditioned so that it can be automatically rescinded, or at least re-examined in an expedited proceeding, should any competitor or potential competitor of the alliance carriers demonstrate that any relevant market is not in fact fully open to competition.

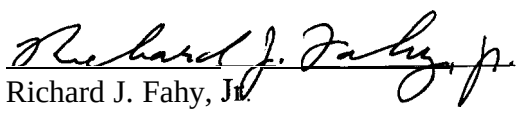
Respectfully submitted,

Richard J. Fahy, Jr.
Attorney for
Trans World Airlines, Inc.

June 4, 1996

CERTIFICATE OF SERVICE

I hereby certify that I have on this day served a copy of the foregoing document upon all persons named on the attached service list by causing copies therof, postage prepaid, to be mailed to each of them.



Richard J. Fahy, Jr.

June 4, 1996

Marshall S. Sinick
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20004

John E. Gillick
Winthrop, Stimson, Putnam & Roberts
1133 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20004

R. Bruce Keiner
Crowell & Moring
1001 Pennsylvania Ave., N. W.
Wshington, D.C. 2004

Robert E. Cohn
Shaw, Pittman, Potts & Trowbr idge
2300 N Street, N.W.
Washington, D. C. 20037

Megan Rae Poldy
Associate General Counsel
Northwest Airlilnes, Inc.
901 15th St., N.W.
Suite 310
Washington, D.C. 20005

Stephen H. Lachter
2300 N Street, N.W.
Suite 725
Washington, D.C. 20037

Frank Cotter
Assistant General Counsel
USAir, Inc.
2345 Crystal Drive
8th Floor
Arlington, VA 22227

Richard D. Mathias
Cathleen Peterson
Zuckert, Scoutt & Rasenberger, L.L.P.
888 17th St., N.W.
Suite 600
Washington, D.C. 20036

Patrick P. Salisbury
Salisbury & Ryan
1325 Avenue of the Americas
New York, NY 10019

Joel Stephen Burton
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20036

Mark S. Kahan
Galland, Kharasch, Morse & Garfinkle
1054 31st Street, N.W.
Washington, D.C. 20007

Steve Hartung
Foley & Lardner
777 E. Wisconsin Ave.
Milwaukee, WI 53202

David L. Vaughan
Kelley, Drye & Warren
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Vance Fort
World Airways, Inc.
13873 Park Center Road
Suite 490
Herndon, VA 22071

Thomas C. Accardi
Federal Aviation Administration
Director of Flight Operations
800 Independence Ave., S.W.
Room 821
Washington, D.C. 20591

Richard P. Taylor
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

James R. Weiss
Preston, Gates, Ellis & Rouvelas
1735 New York Ave., N.W.
Suite 500
Washington, D.C. 20006

John L. Richardson
Vedder, Price, Kaufman & Day
2121 K Street, N.W.
Suite 700
Washington, D.C. 20036

U.S. Transcom/TCJ5
Attention: Air Mobility Analysis
508 Scott Drive
Scott AFB, IL 62225

Stephen L. Gelband
Hewes, Morella, Gelband & Lamberton
1000 Potomac St., N.W.
Suite 300
Washington, D.C. 20007

D. Scott Yohe
Vice President - Gov't Affairs
Delta Air Lines, Inc.
1629 K Street, N.W.
Washington, D.C. 20006

William Karas
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

Craig Denny'
Vice President
Big Sky Airlines
P.O. Box 31397
Logan Int'l Airport
Billings, MT 59107

R. Tenney Johnson
2300 N Street, N.W.
6th Floor
Washington, D.C. 20037

Jonathan B. Hill
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

J.E. Murdock III
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

William C. Evans
Verner, Liipfert, Bernhard; McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

John J. Varley
General Attorney
Delta Air Lines, Inc.
1030 Delta Boulevard
Atlanta, GA 30320

Nathaniel P. Breed, Jr.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D.C. 20037

Russell E. Pommer
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Berl Bernhard
Verner, Liipfert, Bernhard,
McPherson and Hand
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Steven A. Alterman
Meyers & Alterman
1220 19th Street, N.W.
Washington, D.C. 20036

Aaron A. Goerlich
Boros & Garofalo, P.C.
1201 Connecticut Ave., N.W.
Suite 700
Washington, D.C. 20036

Roger W. Fones
Chief, Transportation,
Energy & Agriculture
Section
Antitrust Division
Department of Justice
555 Fourth Street, N.W.
Room 9104
Washington, D.C. 20001

Gerard J. Arpey
Senior Vice President -
Finance and Planning and
Chief Financial Officer
American Airlines, Inc.
P.O. Box 619616, MD 5621
DFW Airport, Texas 75261

Gregg A. Saretsky
Vice President - Pasenger Marketing
Canadian Airlines International Ltd.
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2W2

Arnold J. Grossman
Vice President - International
Affairs
American Airlines, Inc.
P.O. Box 619616, MD 5635
DFWAirport, Texas 75261

Kenneth J. Fredeen
Solicitor
Canadian Airlines International Ltd.
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2W2

Edward P. Faberman
Vice President - Government Affairs
American Airlines, Inc.
101 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Stephen P. Sibold
Acting General Counsel
Canadian Airlines International Ltd.
Suite 800
700 - 2nd Street S.W.
Calgary, Alberta, Canada
T2P 2W2

Carl B. Nelson, Jr.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, D.C. 20036

David B. Ortman
Law Offices of David B. Ortman
61 G Street, N.W.
Washington, D. C. 20024

Donald B. Casey
Vice President - Capacity Planning
Canadian Airlines International Ltd.
Suite 2800
700 - 2nd Street S.W.
Calgary, Alberta, Canada T2P 2W2